PD-0388-19
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 6/24/2019 5:24 PM
Accepted 6/26/2019 10:08 AM
DEANA WILLIAMSON
CLERK

Case No. PD-0388-19

FILED
COURT OF CRIMINAL APPEALS
6/26/2019
DEANA WILLIAMSON, CLERK

In the
COURT OF CRIMINAL APPEALS
OF TEXAS

CHASE ERICK WHEELER
Appellant and Respondent,
v.

THE STATE OF TEXAS
Appellee and Petitioner.

From the Court of Appeals for the Second District of Texas
Case No. 02-18-00197-CR
Appeal from Case No. 1473912 in
County Criminal Court No. 3 of Tarrant County, Texas
The Hon. Bob McCoy, Judge Presiding

REPLY TO THE STATE'S PETITION FOR DISCRETIONARY REVIEW

J. Daniel Clark
State Bar No. 24109732
150 Reserve St, Suite 190
Southlake, Texas 76092
Tel: (817) 953-8699
Fax: (817) 668-0659
jdc@jdanielclark.com

Stephanie M. Gonzales
State Bar No. 24061249
P.O. Box 121728
Arlington, Texas 76012
Tel: (214) 799-8660
Fax: (817) 549-0374
gonzaleslawdfw@gmail.com

Counsel for Appellant

Bound by its singular and unusual facts, this case presents no reason for discretionary review.

The Second District Court of Appeals twice noted how singular and unusual the facts of this case are.[1] What makes them so? Namely, that:

- The Officer here failed to swear to his search warrant affidavit under oath.[2]
- This was not a one-time-good-faith mistake. He actually failed to swear under oath to *any* of his search warrant affidavits in the fourteen months he was employed by this particular police department.[3]
- On the other hand, search warrant affidavits submitted to the magistrate by other officers at his department ordinarily contained evidence that an oath was administered.[4]
- But somehow—and despite his academy training to the contrary[5]—this Officer believed his department's standard procedure did not require search warrant affidavits to be sworn under oath.[6]

To these unusual facts, the Court of Appeals refused to apply 38.23(b)'s good-faith exception to the exclusionary rule.[7] Its refusal was a

---

[1] *Wheeler v. State*, --S.W.3d--, No. 02-18-00197-CR, 2019 Tex. App. LEXIS 2233 at *1, *20 (Tex. App.—Fort Worth Mar. 21, 2019).
[2] RR 2: 5 (State stipulating it was unsworn); RR2: 18 (Officer admitting it was unsworn); RR2: 52-57 (Magistrate admitting it was unsworn and not a proper affidavit).
[3] RR 2: 19; at the time of the Motion to Suppress hearing, the Officer was employed at his third police department within a three-year span. RR 2: 7.
[4] RR 2: 67.
[5] RR 2: 26.
[6] RR 2: 20.
[7] *Wheeler*, 2019 Tex. App. LEXIS 2233 at *18-*19.

straightforward reading of the statute, which requires *objective* good-faith reliance on the warrant.[8] And the Court of Appeals concluded that no objectively reasonable police officer could rely on a search warrant he knew to be tainted by the complete absence of an oath—a search warrant issuance requirement that is both "constitutionally and statutorily indispensable."[9] That is hardly groundbreaking law. No more so than the conclusion that no objectively reasonable police officer could rely on a search warrant that he knew to be tainted by the complete absence of either of the two other warrant issuance requirements: probable cause and particularity.[10]

From the singular facts of this case, the Court of Appeals' conclusion was obvious. The court did not decide an important question of state law that has not been, but should be, settled by this Court. Nor did it decide an important question of state law in a way that conflicts with the applicable decisions of this Court and the Supreme Court. This case warrants no review by this Court.

---

[8] Tex. Code Crim. Proc. art. 38.23(b) (West 2018) (emphasis added).
[9] *Wheeler*, 2019 Tex. App. LEXIS 2233 at *9-*10, *18 (citing *Clay v. State*, 391 S.W.3d 94, 97-98 (Tex. Crim. App. 2013)).
[10] Tex. Const. art. I § 9; Tex. Code Crim. Proc. art. 1.06 (West 2018).

This case is unlike any offered by Petitioner—there are no lower court conflicts here.

In its petition, the State takes a deep dive into the impact of oath-affirming language on perjury prosecutions and into the facts and briefing behind *Hardy v. State*, a case presenting an evidence sufficiency claim from a perjury conviction.[11] Although one purpose of an oath is to subject an affiant to perjury, that is not what this case is about. It is about whether an officer's reliance on a warrant was objectively reasonable when he knew that the affidavit supporting the warrant was unsworn—devoid of any oath or affirmation.

As this Court observed in *McClintock v. State*, the good-faith exception of 38.23(b) applies where the law enforcement conduct was "close enough to the line of validity" such that an objectively reasonable officer preparing the affidavit or executing the warrant would believe that the information supporting the warrant was not tainted by unconstitutional conduct.[12] The good-faith exception cannot apply in Wheeler's case because this Officer's conduct was a "long-distance call away from the line of validity."[13]

---

[11] *See State's Petition for Discretionary Review*, Case No. PD-0388-19, at *13-*18 (May 23, 2019); *see also Hardy v. State*, 213 S.W.3d 916, 917 (Tex. Crim. App. 2007).
[12] *McClintock v. State*, 541 S.W.3d 63, 72-73 (Tex. Crim. App. 2017) (internal quotation marks omitted).
[13] *Wheeler*, 2019 Tex. App. Lexis 2233 at *18.

Like it did below, the Petitioner has tried to make this case seem like others, almost all unpublished, in which there *was* some indication or evidence that the warrant had been sworn, but improperly so.[14] As the Court of Appeals distinguished: "[h]ere, the evidence was undisputed that no oath or its equivalent was made. . . [the] affidavit was not improperly sworn; it was completely unsworn."[15] The Second District Court of Appeals' published opinion has created no conflict in the lower courts.

The purpose of the exclusionary rule is served by the Second District Court of Appeals' decision.

The purpose of the exclusionary rule is to deter police misconduct.[16] Whether this Officer's conduct derived from a wrong assumption or from repeated ignorance,[17] failing to swear to search warrant affidavits for

---

[14] *Ashcraft v. State*, No. 03-12-06600-CR, 2013 Tex. App. Lexis 10402 (Tex. App.—Austin Oct. 25, 2018, no pet.) (mem. op., not designated for publication); *Flores v. State*, 367 S.W.3d 697 (Tex. App.—Houston [14th Dist.] 1995, pet. ref'd); *Swenson v. State*, No.05-09-00607-CR, 2010 Tex. App. Lexis 1832 (Tex. App.—Dallas Mar. 16, 2010, no pet.) (mem. op., not designated for publication); and *Longoria v. State*, No. 03-16-00804-CR, 2018 Tex. App. Lexis 8675 (Tex. App.—Austin Oct. 25, 2018, no pet.) (mem. op., not designated for publication).

[15] *Wheeler*, 2019 Tex. App. Lexis 2233 at *14.

[16] *See Drago v. State*, 553 S.W.2d 375, 378 (Tex. Crim. App. 1977) ("The primary purpose of the exclusionary rule is to deter police activity that could not have been reasonably believed to be lawful by officers committing the same.").

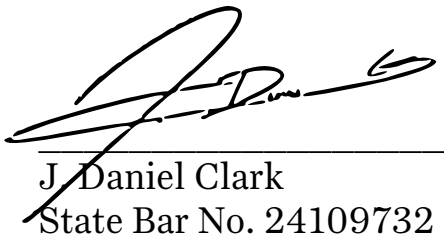
[17] *See Wheeler*, 2019 Tex. App. Lexis 2233 at *18.

fourteen months, despite being trained otherwise, is conduct worthy of deterrence.

Conclusion

The Court of Appeals for the Second District of Texas carefully and correctly applied the relevant substantive law to the unusual facts presented by this case. For that reason, discretionary review is unwarranted. Accordingly, Respondent Wheeler will file no further reply unless this Court grants Appellee's petition for discretionary review.

Respectfully submitted,



J. Daniel Clark
State Bar No. 24109732
150 Reserve St, Suite 190
Southlake, Texas 76092
Tel: (817) 953-8699
Fax: (817) 668-0659
jdc@jdanielclark.com
www.jdanielclark.com

Certificate of Compliance

I certify that this reply to a petition for discretionary review complies as to form with Tex. R. App. P. Rule 9.4. Upon reliance of the word count feature of Microsoft Word for Mac Version 16.26, this reply complies with Tex. R. App. P. Rule 9.4(i)(2)(E) because it contains approximately 1,000 words exclusive of the sections excepted by Tex. R. App. P. Rule 9.4(i)(1).

/s/ J. Daniel Clark
J. Daniel Clark

Certificate of Service

On June 24, 2019, a true copy of Respondent's Reply was e-served on the parties below:

Mr. Joseph W. Spence & Ms. Shelby J. White
Tarrant County Criminal District Attorney's Office
401 W. Belknap Street, Fort Worth, Texas 76102
CCAappellatealerts@tarrantcountytx.gov, sjwhite2@tarrantcountytx.gov

Office of the State Prosecuting Attorney of Texas
209 W. 14th Street, Austin, Texas 78701
information@spa.texas.gov

/s/ J. Daniel Clark
J. Daniel Clark